1. S.B.Civil Second Appeal No.470/2006.
   Jethmal. vs. LRs. of Choutmal & Ors.
2. S.B.Civil Second Appeal No.376/2006.
   Jethmal. vs. LRs. of Choutmal & Ors.

Date : 10.5.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.Ravi Bhansali, for the appellant.

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Heard learned counsel for the appellant/ plaintiff.

The appellant/plaintiff is aggrieved despite the fact that his suit was decreed by the trial court and the appellate court modified the decree but granted substantial relief to the appellant.

Learned counsel for the appellant vehemently submitted that the first appellate court did not consider a single argument raised by the appellant before the first appellate court and thereby committed serious error of law. It is also submitted that the earlier decision given by the civil court and the matter which was taken upto this Court and decided by

this Court was only against the plaintiff's mother and the plaintiff was not party in that litigation, therefore, principle of res judicata could not have been applied in the present litigation. It is submitted that in the earlier litigation, since the appellant was not party, therefore, the appellant is not bound by any decision given in that lis, still the two courts below merely on the basis of the decision of this Court in the earlier lis, held that the chowk in question is common chowk.

I considered the submissions of learned counsel for the appellant and perused the reasons given in the judgments of the two courts below.

It will be worthwhile to mention here that the plaintiff's suit was decreed by the trial court partly even when the plaintiff's contention that the chowk in dispute is his personal chowk was rejected. The chowk in dispute was held to be common chowk, in view of the finding given in the earlier round of litigation wherein the plaintiff's mother was party. Since, the chowk was held to be common chowk, the trial court granted decree on the ground that in common chowk, the defendant could not have constructed the drain nor he could have filled the chowk by sand and, therefore, directed the defendant to remove the drain and sand

from the chowk.

The judgment and decree of the trial court was challenged by the plaintiff as well as defendant by preferring separate appeals. Both the appeals were decided by the common judgment and decree by the first appellate court dated 7.4.2004. The first appellate court was of the view that so far as construction of drain is concerned, it was with the consent of other persons who had a right to use the chowk and the grievance of the appellant can be redressed by directing defendants to make ramp where the drain is above the level of the ground.

Since two appeals were decided by the common judgment and decree of the first appellate court arising out of one decree passed in one suit, therefore, the appellant has preferred these two appeals – one to challenge the decision in the plaintiff's appeal and another to challenge the decision given in the defendant's appeal.

It appears that the plaintiff's mother herself suffered a judgment and decree whereby she was restrained from putting any obstruction in the chowk in dispute which was held to be common chowk. It is admitted that the plaintiff's mother is no more and the plaintiff being heir of his mother now cannot say that he is not bound by the judgment and decree which was

passed against his mother, may she be one of the co-sharer in the property only. The position continued since 1978.

In view of the above reasons, even if the first appellate court has not mentioned facts and grounds in detail but it is clear from the judgment of the first appellate court that the first appellate court clearly upheld the finding of the trial court about the effect of the judgment given in the earlier litigation against the plaintiff's mother, the plaintiff substantially got the relief so that he may not have any obstruction in the chowk because of existence of drain. Otherwise also, in a suit for mandatory injunction, there may be reasons for not granting decree for mandatory injunction on equitable grounds.

In view of the above, I do not find any substantial question of law involved in these appeals.

Consequently, these second appeals, having no merit, are hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya